IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Arbitration Case No.62 of 2005

Date of Decision: 27 - 11 - 2007

National Buildings Construction Corporation Limited ....Petitioner

through Mr.Ajay Tewari , Advocate

v.

Punjab State Electricity Board and others ....Respondents

through Mr.Y.P.Khuller, Advocate

CORAM: HON'BLE MR.JUSTICE VIJENDER JAIN, CHIEF JUSTICE

***

1. Whether Reporters of Local Newspapers may be allowed to see the judgment?

2. To be referred to the Reporters or not?

3. Whether the judgment should be reported in the Digest?

***

VIJENDER JAIN, CHIEF JUSTICE (ORAL)

This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred as, `the Act') has been filed by the petitioner invoking the arbitration clause which is at page 94 of the paper-book. Same reads as under:-

> "If at any time any question, dispute or difference, whatsoever, shall arise, between the Purchaser/Board and the Contractor/Supplier, upon or in relation to or in connection with the Purchase Order/Contract, either party may forth-with give to the other, notice in writing of the existence of such question dispute or difference and

the same shall be referred for sole arbitration of a nominee of the Purchaser/Board, who shall give a reasoned/speaking award. The award of the Sole Arbitrator shall be final and binding on the parties under the provisions of the Indian Arbitration Act, 1940 and of the rules thereunder. Any statutory amendment, modification of re-enactment thereof for the time being in force, shall be deemed to apply to an be incorporated in the Contract/Purchase Order. It will not be objectionable if the Sole Arbitrator is an officer of the Board and he has expressed his views on all or any of the matters in question of dispute or difference."

The arbitration clause is admitted between the parties. However, learned counsel for the respondents has contended that the petitioner had waived of the said arbitration clause. In this regard, he has placed reliance on the package deal dated 28.2.2001 which was subsequently agreed to by the petitioner and the respondents and is to the following effect:-

"Amendment to package deal/agreement dated 13.5.99

Construction of 2 nos. Cooling Towers at GHTP, Lehra Mohabbat

In partial modification of agreement dated 13.5.99, M/s NBCC Ltd. Having failed to complete the cooling tower No.1 and 2 in all respects except items mentioned in para 4(iv) by the stipulated date i.e. 30.6.99 hereby agree and accept the decision of the Board conveyed vide Engineer – in Chief/Thermal Designs memo No.2564/OHIP/CD-V/632/Vol.13 dated 2.2.2001.

1. We agree to forego Rs.50 lacs, payable to us as per clause 4 (iii) of the agreement dated 13.5.99.
2. We undertake that we shall not go in for arbitration/court case on any of the issues whatsoever including the claims referred to in para 3 of the agreement dated 13.5.99 in case the execution in the completion period is granted to us upto 10.3.2000.
3. This will be full and final settlement of the above claims.

All other terms and conditions of the contract agreement No.1309/Th

dated 31.1.95 and the package deal dated 13.05.99 shall remain the same. Further the above extended completion date shall be without any additional financial liability to the board.

Contractor — Purchaser
S. Shanker — En In Chief/Th(D)
GM (E&M) NBCC."

On the basis of the aforesaid agreement, it is contended before me by the learned counsel that the petitioner has specifically undertaken that it shall not go for arbitration or in court case, on any of the issues. Therefore, having waived of the arbitration clause, the petitioner cannot maintain this petition under Section 11 of the Act.

On the other hand, learned counsel for the petitioner has contended that the petitioner had written a letter on 19.6.2002 inter alia bringing to the notice of the respondents that the package deal for waiving of the arbitration clause was on account of the coercion used by the respondents and their pressure not to release the legitimate dues of the petitioner and that the undertaking given in the package deal was on account of undue influence and, thus, prayed for withdrawal of the undertaking given to the respondents.

I am afraid that the stand of the petitioner as far as letter dated 19.6.2002 is concerned, absolves it from the concession extended for waiving of the arbitration clause. It is not in dispute that the agreement for waiver of arbitration clause was entered between the parties on 28.2.2001, whereas the letter for withdrawal of package deal and undertaking was written by the petitioner on 19.6.2002 i.e. after almost 1 year and 4 months. At this stage, my attention has been drawn by learned counsel for the petitioner to a letter dated 29.11.2002, at page 42 of the paper-book, which was written by the respondents stating therein that in case the petitioner refunds the amount of Rs.2,47,36,309/-, the request for appointment of an arbitrator can be considered by them. From the letter written by the respondents, it is manifestly clear that the respondents themselves have agreed that in the eventuality of certain payments being refunded by the petitioner, request

for appointment of an arbitrator can be considered.

I am not dealing with the merits of the controversy in this matter. Question before me is whether there was a valid agreement and whether there is a live dispute between the parties. From the letter dated 29.11.2002 written by the respondents to the petitioner, it is manifestly clear that even the respondents were prepared to consider the request for appointment of an arbitrator with certain stipulations. That shows that a live wire existed between the petitioner and the respondents and existence of a dispute between the parties, therefore, it cannot be said that the waiving of the arbitration clause by the petitioner was final agreement with the respondents.

As there is existence of a dispute between the parties, I direct the respondents to supply the vacancy in terms of the arbitration clause within a period of six weeks.

Petition stands disposed of.

(VIJENDER JAIN)
CHIEF JUSTICE

November 27, 2007

RC